IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10978 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

AJAY M SHAH

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 10978 of 2002

MR DJ BHATT for Petitioner
MR. S.N.SHELAT, ADVOCATE GENERAL WITH
MR A.J.DESAI, AGP for Respondent No. 1
MR JB PARDIWALA for Respondent No. 2-3
LAW OFFICER BRANCH for Respondent No. 2-3
MR ASIM J PANDYA for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 08/12/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The petitioner challenges the order dated 8th August 2002 terminating the services of the petitioner, who was appointed on probation as a Labour Judge (Junior Division), Class I on the ground that his services were not found to be satisfactory. The petitioner has also challenged communication dated 12th August 2002 of the President of the Labour Court to him requiring him to hand over the charge on the basis of the impugned order dated 8th August 2002.

2. According to the petitioner, he was appointed as ad-hoc Labour Judge initially for a period of one year and looking to his performance, his services were extended and he was continued for three years. In the meantime, in response to an advertisement published by the G.P.S.C. for permanent posts of Labour Judge, the petitioner made an application and was appointed on probation by order dated 12th October 1999, at Annexure "C" to the petition. According to the petitioner, as per Clause 7 of the order of appointment, the period of probation could be reduced in accordance with standing instructions if the incumbent was, in the past, in government service. By order dated 11th June 2001, the period between the date of termination from the ad-hoc post i.e. from 12-10-1999 upto 16-10-1999, when the petitioner was appointed on probation, was regularized as the period on leave without pay. According to the petitioner, looking to the ad-hoc services rendered by him, the probation period of 2 years was over even before the two years' stipulated in the order of his appointment. Moreover, there was nothing in the appointment order empowering extension of the probation period of two years, which was mentioned therein. It is the petitioner's case that, during the period of his ad-hoc service or during his probation, at no point of time was he intimated about any deficiency either on administrative side or judicial side or no adverse remarks were given, and therefore, the impugned order is

violative of Articles 14 and 16 of the Constitution of India. It is also stated that, in the short span of two years, the petitioner came to be transferred to three different places, and, since before he could settle at one place, his transfer was served on him, it affected his disposal of cases. It is also contended that the impugned order was stigmatic since it recorded that the services of the petitioner were unsatisfactory. The petitioner has also narrated the work done by him for settlement of cases in the Lok Adalats and in Legal Literacy Camp. It is also submitted in the petition that the probationers who were similarly situated were confirmed in service on the ground that their services were satisfactory, though some of them who were confirmed were facing serious complaints.

3. In the affidavit-in-reply filed on behalf of the respondent No.2 - High Court, after referring to the decision of the Full Bench holding that the Presiding Officers of the Industrial Courts and Labour Courts constituted judicial services and therefore, the recruitment of Labour Judges was to be made in accordance with Article 234 of the Constitution, there is a reference made to the fact that the Industrial Courts and Labour Courts were brought under the administrative control of the High Court and that, by notification dated 16-10-1999, 21 candidates who were selected through the G.P.S.C. for the post, including the petitioner, were given postings as Judges of the Labour Courts in the State. In paragraph 5 of the affidavit-in-reply, it is stated that, on completion of the two years period of probation on 20-10-2001, the question of appointing within 21 candidates including the petitioner on long term basis was taken up for consideration by the High Court and the High Court by its letter dated 9th January 2002 addressed to the President, Industrial Court, Ahmedabad, who is the Head of the Department, requested him to submit his special report in respect of the probationers, including the petitioner, giving his considered opinion as regards the merits and fitness of the probationers on the question of their continuation of long term basis. The President was informed that he should take into consideration the judgements delivered by such probationers and other aspects of their judicial services in the report that may be sent by him. In his communication dated 18th February 2002, the President of the Industrial Court submitted his special report in respect of the probationers including the petitioner for whom he stated as under :

"He is honest, polite. But his control over his staff is not satisfactory. His disposal is poor and his discussion of law in judgments and orders are not so good. His overall assessment is reasonably good. But I am of the opinion that he may be appointed on long term basis."

In paragraph 7 of the affidavit-in-reply, it is categorically stated that the High Court, while considering the question of appointing the probationers on long term basis, has taken into consideration various aspects like the said special report of the President, confidential report during the period of probation, vigilance cases, departmental inquiries, and administrative complaints. The following adverse remarks made by the President of the Industrial Court in the confidential report of the petitioner were also taken into consideration :

"(III) Administrative capacity:-

(1) Control over the staff. "....But not satisfactory".

(IV) Method of work :-

(e) Overall assessment of Poor disposals :

(f) Disposal of heavy contested matters. Poor

(V) Ability:-

As reflected from R & P in matters under Appeal/Revision with special reference to -

(4) Discussion of law and facts in judgments/orders. Not so good."

It is further stated that thereafter the matter was placed before the Hon'ble the Chief Justice and the Hon'ble the Administrative Judge for the Unit. The Hon'ble Administrative Judge for the Unit opined as under:

Disposal of Mr.A.M.Shah is poor and knowledge of law is not so good.

This officer cannot be appointed on long term basis even if he is found to be honest and polite by the President, Industrial Court.

Thereafter, the file was placed before the Standing Committee on 7-5-2002 and then before the Chamber Meeting on 29-6-2002. A copy of the submission made to the Hon'ble the Chief Justice and the Hon'ble the Administrative Judge for the Unit was shown to us for ascertaining the averments which are made in the affidavit, which shows the opinion of the learned Administrative Judge that the disposal of the petitioner was poor and knowledge of law was not so good and that with these remarks, he cannot be appointed on long term basis even if he was found to be honest and police. The Hon'ble the Chief Justice agreed with the said opinion of the Hon'ble the Administrative Judge and directed the matter to be placed before the Standing Committee. The Standing Committee, in its decision dated 7-5-2002, decided to recommend to the Chamber Meeting to terminate the services of the petitioner with immediate effect on the ground of unsuitability for the office held by him, which recommendation came to be accepted by the Chamber Meeting held on 29-6-2002. It is denied that the impugned order of termination carries any stigma on the petitioner.

4. In his rejoinder, the petitioner has reiterated the averments of his petition and further stated that the president had no occasion to evaluate his performance and that, his performance for the entire career of five years and four months should have been assessed. It is also stated that the guidelines for assessment of candidates put on probation in the government order dated 8th March 1969 have not been followed in his case.

5. The learned counsel appearing for the petitioner strongly contended that the overall performance of the petitioner, including for the period of his ad-hoc appointment was not taken into account. He submitted that the appointment as ad-hoc Judge was made for one year till regular recruits were available. The petitioner was however continued from year to year because his performance was found to be good. If the petitioner's performance as ad-hoc judge had not been good, he would not have been continued for three years after his initial appointment. It was also argued that his assessment after the first year of his probation as communicated to him on 28-4-2001 was good, and that ought

to have been taken into account before taking a decision in the matter. The learned counsel also submitted that the break of 18 days between end of his ad-hoc appointment and starting of his probation, was regularized by considering it as a leave without pay which gave continuity to him in service. On this basis, it was submitted that, his probation period ought to have been considered to have ended much before the period of two years mentioned in the order of his appointment. The learned counsel also submitted that even according to the President, Industrial Court, since the performance of the petitioner was reasonably good, he was required to be continued on long term basis and this recommendation of the President ought to have been accepted by the High Court. The learned counsel submitted that the impugned order was, therefore, arbitrarily made and the petitioner ought to be continued on a long term basis.

6. The learned Advocate General appearing for the respondents submitted that this was not a case of no material or patently arbitrary decision or a decision rendered for collateral purposes. He submitted that the record shows that the High Court, on its administrative side, had applied its mind by calling for the special report of the President of the Industrial court and in the process giving him suitable directions as to what was required to be considered by him before preparing the special report. The recommendation made by the President was taken into account along with the other material and it was open for the High Court not to accept the recommendation and decide to terminate the petitioner's services on the ground that they were not satisfactory on the basis of his performance. The learned Advocate General submitted that the High Court had found that the petitioner should not be appointed on long term basis, because, his disposal was poor and knowledge of law was not so good. It cannot, therefore, be said that the decision of the High Court was based on no material. He pointed out that, as per the report for the period from 1-1-2001 to 31-12-2001 submitted in Form IV in respect of the petitioner by the President of the Industrial Court, the assessment of disposal, was rated as poor and disposal of heavy contested matters was also rated as poor. Against the column "Discussion of law and facts in judgement / orders", the remark was; "Not so good discussion of law". The control over the staff was found to be "not satisfactory". It was submitted that even if the report of the earlier year was good, that did not preclude the High Court from taking a decision on the basis of these remarks, and that it was not open for this Court on its judicial side to sit in appeal over the

decision reached by the High Court on its administrative side which was in no way arbitrary or unreasonable. The learned Advocate General, referring to the order of appointment of the petitioner, submitted that he was directly recruited and appointed on probation basis and his past services on ad-hoc basis were of no consequence even if under condition (7) of the appointment order, in a given case, the probation period could be reduced. He also submitted that the counting of break of 18 days as leave without pay was intended only for the purpose of pensionary benefits and that had no bearing on the question of probation.

6.1 In support of his contentions, the learned Advocate General, relied upon the following decisions :

[a] The decision of the Supreme Court in Oswal Pressure Die Casting Industry, Faridabad v. Presiding Officer, reported in (1998)3 SCC 225, was cited for the proposition that once it was found that the assessment made by the Court was supported by some material and was not malafide, it was not proper for the High Court to interfere and substitute its satisfaction with the satisfaction of the Court. In that case also, the employee had challenged the order of termination of his service while on probation. The Supreme Court held that the High Court was wrong in holding that, in order to support its satisfaction, it was necessary for the appellant to produce some reports or communication or other evidence to show that performance of the respondent was below the expected norms.

[b] The decision of the Supreme Court in High Court of M.P. v. Mahesh Prakash, reported in AIR 1994 SC 2595, was cited to point out that it was held in paragraph 20 of the judgement that, each Civil Judge up for confirmation in Class II, being the class to which he had been recruited, was liable to be judged individually on his own record. In paragraph 21 of the judgement, it was observed that, it was a function of the Chief Justice to appreciate the merits and demerits of the subordinate judges and he is entitled to record his comments upon them and make his views known during relevant discussion at the Full Court meeting.

[c] The decision of the Supreme Court in Dr.T.C.M. Pillai v. The Indian Institute of Technology,

reported in AIR 1971 SC 1811, which was rendered in the context of the termination of service of a probationer, was cited for the proposition that suitability of an employee does not depend merely on the excellence or proficiency in work. The Supreme Court held that many factors enter into consideration and a particular attitude or tendency displayed by an employee can well influence the decision of the confirming authority while judging his suitability or fitness for confirmation. In paragraph 7 of the judgement, it was observed that, a particular attitude or tendency displayed by an employee can well influence the decision of the confirming authority while judging his suitability or fitness for confirmation.

[d] The decision of this Court in K.D.Vohra and others v. Kamleshbhai Gobarbhai Patel and others, reported in 2003(1) G.L.H. 312, was cited for the proposition that appointments in ad-hoc capacity even if continued for a longer time would not alter the status of the employee, whose appointment would remain on ad-hoc basis.

[e] The decision of the Supreme Court in High Court of Judicature, at Patna v. Pandey Madan Mohan Prasad Sinha, reported in (1997) 10 SCC 409, was cited for the proposition that an order terminating the service of a probationer can be questioned only if it is shown that it has been passed arbitrarily or by way of punishment without complying with the requirements of Article 311(2) of the Constitution of India.

7. Admittedly, the petitioner was appointed on probation on purely temporary and ad-hoc basis, as stated in the order of appointment dated 12-10-1999, a copy of which is at Annexure "C" to the petition. As stipulated in Condition (3) of the order of appointment, the appointment on long term basis could be given only on satisfactory completion of the probation period. It was also clarified therein that such regular appointment could be made only by issuing an order of regular appointment, which means, it was not meant to be an automatic continuation on long term basis merely on expiry of two years' period. This aspect was considered by a Division Bench of this Court in Special Civil Application No. 10842 of 2002, decided on 1-12-2004, in which, in the context of Rule 3 of the Recruitment Rules for the post of Labour Court Judge (Junior Division),

1982 and the terms and conditions incorporated in the order of appointment and on the basis of the decisions of the Apex Court, it was held that the rule or the order of appointment did not provide for any deemed confirmation on expiry of the period of probation, and that the order of appointment contemplated a positive order of confirmation to be passed if the period of probation was satisfactorily completed.

8. It is a settled legal position that a probationer does not have a right to hold the post during the period of probation. From the material on record, it appears that the High Court on its administrative side had considered the service record of the petitioner along with the special report which was called for. A detailed submission was made by the Registry to the Hon'ble the Chief Justice and the Administrative Judge drawing their attention to all the material particulars which were required to be considered for deciding the question whether the petitioner and other probationers should be continued on long term basis or not. Since as a probationer, the petitioner had no right to hold the post, there was no question of providing of any opportunity of being heard to the petitioner before terminating his services. The contention that the adverse remarks made in the report by the President of the Industrial Court were not communicated to the petitioner, cannot be countenanced because, as held by the Supreme court in High Court of Patna v/s Pande Madan Mohan (supra), the principles of natural justice have no application in the case of termination of services of a probationer during the period of probation since he has no right to hold the post. The Supreme court, in terms, held that it was not possible to hold that there is an obligation to communicate the adverse material to a probationer before a decision is taken on the basis of said material that he is not fit for being retained in service. It was held that such material can be relied upon to show that such a decision does not suffer from the vice of arbitrariness and is not capricious.

8.1 The record clearly shows that the competent authority had taken into consideration the confidential record indicating the aforesaid adverse remarks which were made against the petitioner showing that, during the period from 1-1-2001 to 31-12-2001, the overall assessment of his disposal was poor, disposal of heavy contested matters was also poor, discussion of law and facts in judgement / orders was not so good, and that the control over the staff was not satisfactory. Since the decision has been based on material which is germane to

the taking of the decision in such matters, it cannot be said that the services of the petitioner were arbitrarily terminated. The impugned order of termination is of termination simpliciter passed in accordance with the terms and conditions of the appointment of the petitioner on probation and does not cast any stigma on the petitioner.

9. There is no substance in the contention that the past services of the petitioner in ad-hoc capacity ought to be considered, and that his performance during that period was relevant. Such a course would be contrary to the terms stipulated in the order of appointment of the petitioner, which was on probation from the date of the appointment. It is obvious from the nature of appointment of the petitioner that his performance during the period of probation which was to be counted from the date of his appointment under order dated 12-10-1999 was alone relevant for the purpose of deciding whether his work was satisfactory or not, and any prior period during which he may have worked on ad-hoc basis, was not at all relevant for the purpose in face of the specific condition of the order of his appointment that he would be continued on long term basis only by making of a specific order, if his work during the period of probation was found to be satisfactory. Reference to any earlier period during which the petitioner worked on ad-hoc basis is, therefore, wholly irrelevant.

10. The contention of the learned counsel for the petitioner was that "the entire service jurisprudence is based upon comparison, because, there is no question of invoking Article 14 or 16 of the Constitution if comparison goes". This submission was made with reference to continuance in service on long term basis of one Mr.N.N.Patni, against whom, there were the adverse remarks that the overall administration of disposal was "not so good", that his discussion of law and facts in judgement / orders were "not in detail", and that he had no studious habits. There cannot be any comparison made between the adverse remarks of the petitioner and the adverse remarks of Mr.Patni. The case of each judicial officer was required to be considered on the basis of his own performance. As held by the Supreme Court in T.C.M. Pillai (supra), there are many factors which enter into consideration for confirming a person who is on probation. A particular attitude or tendency displayed by an employee can well influence the decision of the confirming authority while judging his suitability or fitness for confirmation. It was held that suitability does not depend merely on the excellence or proficiency

in work. In paragraph 8 of the judgement, the Supreme Court held that, even assuming that those reports were favourable so far as the academic work of the appellant in that case was concerned, the Board was entitled to take into consideration the other matters for the purpose of deciding whether he should be confirmed.

11. In the above view of the matter, we do not find any warrant for interference with the impugned order which has been validly passed in accordance with law. The petition is, therefore, rejected. Rule is discharged with no order as to costs.

[R.K.ABICHANDANI, J.]

[K.A.PUJ, J.]

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